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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MICHAEL ANTHONY EASTMAN

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Appeal 2009-005135  
Application 10/719,834  
Technology Center 3700

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Decided: December 16, 2009

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Before: WILLIAM F. PATE III, JENNIFER D. BAHR, and  
LINDA E. HORNER, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL  
STATEMENT OF THE CASE

Michael Anthony Eastman (Appellant) seeks our review under 35 U.S.C. § 134 of the Examiner's final decision rejecting claims 1-14. We have jurisdiction under 35 U.S.C. § 6(b) (2002).

## SUMMARY OF DECISION

We AFFIRM.

### THE INVENTION

Appellant's claimed invention is a contact lens case with a reflective surface in one or more of the contact lens caps in order to conveniently view the insertion or abstraction of the contact lens into or from the eye.

Spec. 1:4-8. Claim 1, reproduced below, is representative of the subject matter on appeal.

1. A contact lens case for storing contact lenses comprising in combination:

a base having a top side;

one or more reservoirs for storing a contact lens on the top side of said base and having an outer surface;

a corresponding cap for each of said reservoirs, said cap being attached to the outer surface of said corresponding reservoir and each cap having its own outer surface and basin; and

a reflective surface covering for the outer surface of at least one cap wherein said reflective surface covering is of a depth that is less than that of the depth of said basin and is secured within said basin.

### THE EVIDENCE

The Examiner relies upon the following evidence:

Ament	US 1,655,452	Jan. 10, 1928
Girard	US 2,650,597	Sep. 1, 1953
Speshyock	US 3,211,281	Oct. 12, 1965
Ulmer	US 3,822,780	Jul. 9, 1974
De Meo	US Des. 358,477	May 23, 1995
Lin	US 5,433,314	Jul. 18, 1995

### THE REJECTIONS

Appellant seeks review of the following rejections by the Examiner:

1. Rejection of claims 9, 12, and 14 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.
2. Rejection of claims 9, 12, and 14 under 35 U.S.C. § 112, second paragraph, as being indefinite.
3. Rejection of claims 1 and 4 under 35 U.S.C. § 102(b) as anticipated by Speshyock.
4. Rejection of claim 6 under 35 U.S.C. § 102(b) as anticipated by Speshyock or in the alternative, under 35 U.S.C. § 103(a) as unpatentable over Speshyock and either Girard or Ament.
5. Rejection of claims 1-14 under 35 U.S.C. § 103(a) as unpatentable over Ulmer and Girard and/or Ament.
6. Rejection of claims 1, 4, and 5 under 35 U.S.C. § 103(a) as unpatentable over De Meo and Girard and/or Ament.
7. Rejections of claims 2, 3, and 6-14 under 35 U.S.C. § 103(a) as unpatentable over De Meo, Girard and/or Ament, and Lin.

### § 112 ISSUES

The Examiner found that claims 9, 12, and 14 do not comply with the written description requirement because the originally-filed Specification does not provide support for securing the reflective surface “toward the center of the depth of said basin against the depth of said reflective surface.” Ans. 3-4. The Examiner also concluded that claims 9, 12, and 14 are indefinite because it is not clear what embedding means or what

compression force is exerted toward the center of the depth of the basin.

Ans. 4.

Appellant argues that the “specification supports the claim elements and the claim elements are clearly defined either by their plain language definition or as defined in the specification.” App. Br. 9-11.

The issues before us are:

Has Appellant shown the Examiner erred in finding that the Specification does not provide support for securing the reflective surface “toward the center of the depth of said basin against the depth of said reflective surface”?

Has Appellant shown the Examiner erred in concluding that claims 9, 12, and 14 are indefinite?

### FINDINGS OF FACT

We find that the following enumerated facts are supported by at least a preponderance of the evidence. *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (explaining the general evidentiary standard for proceedings before the Office).

1. Appellant’s Specification does not use the term “secured” or “securing” to describe the attachment of the mirror within the basin. Spec. *passim*.
2. Appellant’s Specification describes that the reflective surface is “adhered to or embedded into” one or more of the caps. Spec. 4:11-13. In other embodiments, Appellant’s Specification describes the reflective surface as “attached to” or “adhered to” the outer surface of at least one flange that is removably attached to

- the outer surface of each reservoir. Spec. 5:9-13, 17-20.
3. Appellant's Specification does not provide examples, a description, depiction, or other details for what "adhered to," "attached to," or "embedded into" means. Spec. *passim*.
  4. Appellant's Specification describes an embodiment with the reflective surface (mirror 10) "within the basin" of cap 11 (the cap is also numbered 13, see figs 1, 2). Spec. 6:10-13; 8:10; figs. 1-5. However, Appellant's Specification does not describe or depict the reflective surface as attached, adhered, or embedded at a location that is toward the center of the depth of the basin against the depth of the reflective surface. Spec. *passim*.
  5. Appellant's Specification does not describe the size of the diameter of the reflective surface relative to the size of the diameter of the basin and does not describe the reflective surface creating compressive forces against the sides of the basin. Spec. *passim*.

#### PRINCIPLES OF LAW

The fundamental factual inquiry in determining whether a claimed invention satisfies the written description requirement of 35 U.S.C. § 112, first paragraph, is whether the specification conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, applicant was in possession of the invention as now claimed. *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed. Cir. 1991). The claimed subject matter need not be described *in haec verba* in the original specification in order to satisfy the description requirement. *In re Wright*, 866 F.2d 422, 425 (Fed. Cir. 1989). Rather, "the specification as originally filed must convey clearly to

those skilled in the art the information that the applicant has invented the specific subject matter later claimed.” *Id.* at 424 (quoting *In re Smith*, 481 F.2d 910, 914 (CCPA 1973)). The PTO has the initial burden of presenting evidence or reasons why persons skilled in the art would not recognize in the disclosure a description of the invention defined by the claims. *In re Wertheim*, 541 F.2d 257, 263 (CCPA 1976).

The test for definiteness under 35 U.S.C. § 112, second paragraph, is whether “those skilled in the art would understand what is claimed when the claim is read in light of the specification.” *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.*, 806 F.2d 1565, 1576 (Fed. Cir. 1986) (citations omitted).

#### ANALYSIS

*Rejection of claims 9, 12, and 14 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirements*

##### *Claim 9*

Claim 9 depends indirectly from claim 6, and recites that “said reflective surface is secured within said basin toward the center of the depth of said basin against the depth of said reflective surface.”

Appellant’s Specification does not use the claim term “secured,” but rather describes the reflective surface as “adhered to,” “attached to,” or “embedded into” (Facts 1, 2). Appellant’s Specification does not provide examples, a description, a depiction, or other details elaborating on the meaning of the terms: “adhered to,” “attached to,” or “embedded into” (Fact 3). Further, Appellant’s Specification does not describe or depict the location of the attachment, adherence, or embedding as “toward the center of the depth of said basin against the depth of said reflective surface” (Fact 4). Based on this, Appellant has not disclosed “such descriptive means as

words, structures, figures, diagrams, formulas, etc., that fully set forth the claimed invention.” *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 323 F.3d 956, 969 (Fed. Cir. 2002) (quoting *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997)).

To counter the Examiner’s rejection of claim 9, Appellant conclusively asserts that the “specification supports the claim elements and the claim elements are clearly defined either by their plain language definition or as defined in the specification,” and cites to several portions of the original disclosure without further explanation. App. Br. 9-10. Neither Appellant’s conclusory argument, nor the portions of the original disclosure cited by Appellant persuade us of error by the Examiner.

#### *Claim 12*

Similarly to claim 9, claim 12 also depends indirectly from claim 6, and recites the reflective surface is secured within the basin “toward the center of the depth of said basin against the depth of said reflective surface.” Claim 12 differs from claim 9 in that claim 12 adds the limitation that the reflective surface is “secured” by “embedding means.”

Appellant repeats the conclusory argument used against the rejection of claim 9, namely that the “specification supports the claim elements and the claim elements are clearly defined by their plain language definition or as defined in the specification,” and cites to several portions of the original disclosure without further explanation. App. Br. 9-10. For the reasons explained in the analysis of claim 9, *supra*, this argument is also unconvincing here.

Appellant also asserts a commonly understood meaning for “embed.”<sup>1</sup> App. Br. 11. Even if we adopt Appellant’s definition of embed, this definition alone provide no written descriptive support for the claimed *location* of the embedding means (i.e. “toward the center of the depth of said basin against the depth of said reflective surface”).

*Claim 14*

Claim 14 depends from claim 9, adding the further limitation that the “securing means” are “the compressive forces created by the depth of said basin against the depth of said reflective surface where said reflective surface has a slightly larger diameter than said basin.” Because claim 14 depends from claim 9, the compressive forces must act “toward the center of the depth of said basin against the depth of said reflective surface.”

As with claims 9 and 12, Appellant’s Specification does not support that the compressive forces act “toward the center of the depth of said basin against the depth of said reflective surface” (Facts 3, 4). Further, Appellant’s Specification does not describe compressive forces or that the reflective surface has a diameter larger than the diameter of the basin (Facts 5). For these reasons and for the reasons, explained in the analysis of claims 9 and 12, *supra*, Appellant’s arguments are unconvincing here as well. App. Br. 9, 11-12.

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<sup>1</sup> Appellant defined embed as: “1. to fix into surrounding mass; to embed stones in cement; or 2. to surround tightly or firmly; envelope or enclose: Thick cotton padding embedded the precious vase in its box.”

*Rejection of claims 9, 12, and 14 under 35 U.S.C. § 112, second paragraph, as being indefinite*

Claims 9, 12, and 14 each include the limitation that the reflective surface is secured within the basin “toward the center of the depth of said basin against the depth of said reflective surface.”

Appellant generally asserts that the “the claim elements are clearly defined by their plain language definition or as defined in the specification.” App. Br. 9. More specifically, Appellant asserts that cap 12 has a slightly smaller diameter than the reflective surface, creating compressive forces that hold the reflective surface in the basin without adhesive. App. Br. 11-12.

Appellant’s arguments do nothing to address the limitation that the reflective surface is secured within the basin “toward the center of the depth of said basin against the depth of said reflective surface.” Further, Appellant’s Specification does not define the claimed terms “secured,” or “securing,” and also does not describe or depict the location of the reflective surface as “toward the center of the depth of said basin against the depth of said reflective surface” (Facts 1, 4). We conclude that a person of ordinary skill in the art would not understand what is claimed by claims 9, 12, and 14 when the claims are read in light of the Specification.

#### § 102/103 ISSUES

*Anticipation by Speshyock*

Appellant contends that, contrary to the Examiner’s finding, Speshyock discloses a mirrored cover case rather than a reflective surface covering for at least one cap of the reservoir as recited in claims 1, 4, and 6. App. Br. 13.

The issue before us is:

Has Appellant demonstrated the Examiner erred in finding that Speshyock discloses a reflective surface covering for at least one cap of the reservoir as called for in claims 1, 4, and 6?

*Obviousness over Ulmer and Girard and/or Ament*

Appellant contends that Ulmer discloses a reflective surface on a container, rather than a reflective surface covering for at least one cap of the reservoir as recited in claim 1. App. Br. 16.

The issue before us is:

Has Appellant demonstrated the Examiner erred in finding that Ulmer discloses a reflective surface covering for at least one cap of the reservoir?

*Obviousness over De Meo and Girard and/or Ament*

The Examiner found that De Meo discloses a contact lens case with reflective surface covering on the reservoir caps. Ans. 6. The Examiner found in the alternative, that if De Meo's cap is not a reflective surface, then it would have been obvious to secure a reflective surface (as disclosed by Girard and Ament) within a cap of De Meo's contact lens case. Ans. 6.

Appellant groups the dependent claims with their respective independent claims. App. Br. 9. As such, we select claim 1 as the representative claim, and claims 4 and 5 stand or fall with claim 1. 37 C.F.R. § 41.37(c)(1)(vii) (2009). Appellant admits De Meo discloses a standard contact lens case as incorporated in the present claimed device; however, Appellant argues that De Meo does not have a reflective surface on the cap of a reservoir as claimed. App Br. 18. Appellant further contends that Official Notice is insufficient motivation to combine the references, and

it is inconsistent for the Examiner to assert obviousness because a previous Office Action relied upon Official Notice. App. Br. 19.

The issue before us is:

Has Appellant shown the Examiner erred in concluding that the subject matter of claim 1 would have been obvious over the combined teachings of De Meo and Girard and/or Ament?

*Obviousness over De Meo, Girard and/or Ament, and Lin*

The Examiner rejected claims 2, 3, and 6-14 over De Meo and Girard and/or Ament, as explained, *supra*, adding the disclosure of Lin that the cap engages the base by threads. Ans. 6-7.

Appellant groups the dependent claims with their respective independent claims. App. Br. 9. As such, we select independent claims 6 and 10 as the representative claims. Claims 7-9, 12, and 14 stand or fall with claim 6, and claim 11 stands or falls with claim 10. 37 C.F.R. § 41.37(c)(1)(vii) (2009). Appellant relies on the same arguments for patentability of dependent claims 2, 3, and 13, and independent claims 6 and 10 that were made for patentability of claim 1 over De Meo and Girard and/or Ament. App. Br. 19. With regard to claim 6, Appellant additionally contends that Girard and Ament do not disclose attaching the reflective surface to the cap. App. Br. 19.

The issue before us is:

Has Appellant shown the Examiner erred in the rejection of claim 6 because Girard and Ament do not disclose attaching the reflective surface to the cap?

ADDITIONAL FINDINGS OF FACT

6. Speshyock discloses a device for the storage of contact lenses. Speshyock, col. 1, ll. 9-10. The device includes a case comprised of bottom portion 1 and removable cover 2. Speshyock, col. 3, ll. 42-44, figs. 1, 2. Bottom portion 1 has two bosses 6, 6 for detachably mounting two cylindrical fluid containers 9, 9. Speshyock, col. 3, ll. 52-53, 62-63; fig. 3. Fluid containers 9 each include a fluid compartment 12 and a cap 15. Speshyock, col. 3, ll. 72-75; fig. 3. Removable cover 2 holds in its top face a mirror 5. Speshyock, col. 3, ll. 48-51, figs. 1, 3.
7. Ulmer discloses a case for storing contact lenses. Ulmer, col. 1, ll. 5-6; fig. 1. The case is comprised of a container 14 that is sealed by a cap 18. Ulmer, col. 3, ll. 8-9; fig. 1. Cap 18 includes a lens-supporting base plate 20, and the outside surface of container 14 includes a mirror 60 to facilitate insertion of the contact lens into the eye of the wearer. Ulmer, col. 3, ll. 9-10; col. 5, ll. 35-38; fig. 1. Base plate 20 has two longitudinally-spaced compartments 30 and 31 for holding a contact lens 12, each compartment 30, 31 having a cover 34. Ulmer, col. 3, ll. 27-29; figs. 1, 2.
8. Girard discloses a lipstick case comprised of a lipstick holder 12 and a cover section 6. Girard, col. 1, ll. 3-6; col. 2, ll. 16-20; figs. 1, 2. Cover section 6 has a flat reflecting mirror 28 “solidly embedded therein,” and cover section 6 is intended for the user to hold in one hand while having the lipstick holder 12 in the other hand. Girard, col. 1, ll. 5-9; col. 3, ll. 1-3; figs. 1, 2.

9. Ament discloses a detachable mirror cap for lip-stick holders to aid in application of lipstick. Ament, 1:1-4, 11-15; figs. 1-3. Ament discloses the case is comprised of a case body 1 having a cap 3, and a clip 4 holding a small convex beveled mirror 5 to the end of the cap 3. Ament, 1:37-45; figs. 1, 2, 3.
10. De Meo discloses an ornamental design for a disposable lens case. De Meo, claim.
11. De Meo depicts a contact lens case with diagonal hash marks on the circular surface of the cap. De Meo, figs. 1, 2, 7, 8.
12. The Office Action that is the subject of this appeal did not rely upon Official Notice in the rejection of claims 1, 4, and 5 under 35 U.S.C. § 103(a) as unpatentable over De Meo and either Girard or Ament or in the rejection of claims 2, 3, and 6-14 under 35 U.S.C. § 103(a) as unpatentable over De Meo, either Girard or Ament, and Lin. Office Action dated September 1, 2006, pages 6-8.

#### ANALYSIS

*Rejection of claims 1 and 4 under 35 U.S.C. § 102(b) as anticipated by Speshyock; and rejection of claim 6 under 35 U.S.C. § 102(b) as anticipated by Speshyock or in the alternative, under 35 U.S.C. § 103(a) as unpatentable over Speshyock and either Girard or Ament.*

Independent claim 1, its dependent claim 4, and independent claim 6 each require a contact lens case with at least one reservoir for storing a contact lens, a corresponding cap attached to the outer surface of each reservoir, and a reflective surface covering for at least one of the caps.

We agree with Appellant that Speshyock discloses a reflective surface covering (mirror) attached to the cover of a contact lens case that houses

contact lens reservoirs, rather than a reflective surface covering attached to a cap for a contact lens reservoir as called for by claims 1, 4, and 6 (Fact 6). See App. Br. 13. Because the Examiner's determination of anticipation or conclusion of obviousness for claims 1, 4, and 6 is based on an erroneous underlying finding of fact, Appellant has demonstrated the Examiner erred in rejecting these claims.

*Rejection of claims 1-14 under 35 U.S.C. § 103(a) as unpatentable over Ulmer and Girard and/or Ament*

Independent claims 1, 6, and 10 each require a contact lens case with at least one reservoir for storing a contact lens, a corresponding cap attached to the outer surface of each reservoir, and a reflective surface covering for at least one of the caps.

The Examiner concluded claims 1, 6, and 10 are obvious over Ulmer, and either Girard or Ament based in part on the findings that Ulmer's "cap" 14 has a reflective surface 60, and either Girard or Ament suggests forming a basin on the "cap" 14 of Ulmer. Ans. 5-6. As Appellant correctly points out, the "cap" 14 of Ulmer is not the claimed cap because it is not attached to the outer surface of a reservoir (Fact 7). App. Br. 16.

Because the Examiner's conclusion of obviousness for claims 1, 6, and 10 is based on an erroneous underlying finding of fact, Appellant has demonstrated the Examiner erred in rejecting claims 1, 6, and 10. The rejection of claims 2-5, 7-9, and 11-14 is likewise based on the same error by virtue of their dependence from claims 1, 6, and 10.

*Rejection of claims 1, 4, and 5 under 35 U.S.C. § 103(a) as unpatentable over De Meo and Girard and/or Ament; rejection of claims 2, 3, and 6-14 under 35 U.S.C. § 103(a) as unpatentable over De Meo, Girard and/or Ament, and Lin*

Independent claims 1, 6, and 10 each require a contact lens case with at least one reservoir for storing a contact lens, a corresponding cap attached to the outer surface of each reservoir, and a reflective surface covering for at least one of the caps.

De Meo discloses a contact lens case with caps, and Girard and Ament also disclose a cap with a reflective surface. As such, Appellant's argument that De Meo does not explicitly disclose a reflective surface on the cap of a reservoir as claimed is not persuasive of error in the Examiner's conclusion of obviousness. See App Br. 18. See *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986); *In re Keller*, 642 F.2d 413, 426 (CCPA 1981) (One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references). The Examiner's rejection is based on the combined teachings of De Meo and Girard or Ament. The use of a mirrored surface on the cap of a personal care item (e.g. a lipstick case) to facilitate use of the personal care item was well known in the art, as evidenced by both Girard and Ament (Facts 8, 9). See also Ans. 6 (noting that the mirror of Girard is for application of content of the lipstick case). See *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (It is proper to "take account of the inferences and creative steps that a person of ordinary skill in the art would employ."). Thus, the proposed combination of adding a mirror for a cap of a personal care item as disclosed by Girard and Ament to the contact lens case of De Meo is nothing more than the exercise of ordinary creativity and common sense.

We are unpersuaded by Appellant's contention that Official Notice is insufficient motivation to combine the references, and that it is inconsistent for the Examiner to assert obviousness because a previous Office Action relied upon Official Notice. See App. Br. 19. The Office Action that is the subject of this appeal did not reply upon Official Notice (Fact 12), and whether previous Office Actions relied upon Official Notice is not relevant to our review of the Examiner's rejections. See also Ans. 6-7.

With regard to claim 6, Appellant additionally argues that Girard and Ament do not disclose attaching the reflective surface to the cap. App. Br. 19. Claim 6 requires that the reflective surface be "attached" to the outer surface of at least one cap, and nothing in claim 6 prohibits a removable attachment. Girard discloses a reflective surface attached to the cap, and Ament likewise discloses the reflective surface is attached, albeit removably, to the cap (Facts 8, 9). We fail to see, and Appellant has failed to explain, how Girard and Ament do not meet this limitation.

Appellant has failed to demonstrate error by the Examiner in the rejections of claims 1-3, 6, 10, and 13. Claims 4 and 5 fall with claim 1; claims 7-9, 12, and 14 fall with claim 6; and claim 11 falls with claim 10.

### CONCLUSIONS

Appellant has failed to show the Examiner erred in finding that the Specification does not provide support for securing the reflective surface "toward the center of the depth of said basin against the depth of said reflective surface."

Appellant has failed to show the Examiner erred in concluding that claims 9, 12, and 14 are indefinite.

Appellant has shown the Examiner erred in finding that Speshyock discloses a reflective surface covering for at least one cap of the reservoir as called for in claims 1, 4, and 6.

Appellant has shown the Examiner erred in finding that Ulmer discloses a reflective surface covering for at least one cap of the reservoir as called for in claim 1.

Appellant has failed to show the Examiner erred in concluding that the subject matter of claim 1 would have been obvious in view of the combined teachings of De Meo and Girard and/or Ament.

Appellant has failed to show the Examiner erred in the rejection of claim 6 because Girard and Ament do disclose attaching the reflective surface to the cap.

## DECISION

We AFFIRM the decision of the Examiner to reject claims 9, 12, and 14 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement.

We AFFIRM the decision of the Examiner to reject claims 9, 12, and 14 under 35 U.S.C. § 112, second paragraph, as being indefinite.

We REVERSE the decision of the Examiner to reject claims 1 and 4 under 35 U.S.C. § 102(b) as anticipated by Speshyock.

We REVERSE the decision to reject claim 6 under 35 U.S.C. § 102(b) as anticipated by Speshyock or in the alternative, under 35 U.S.C. § 103(a) as unpatentable over Speshyock and either Girard or Ament.

We REVERSE the decision of the Examiner to reject claims 1-14 under 35 U.S.C. § 103(a) as unpatentable over Ulmer and Girard and/or Ament.

We AFFIRM the decision of the Examiner to reject of claims 1, 4, and 5 under 35 U.S.C. § 103(a) as unpatentable over De Meo and Girard and/or Ament; and the Examiner's decision to reject claims 2, 3, and 6-14 under 35 U.S.C. § 103(a) as unpatentable over De Meo, Girard and/or Ament, and Lin.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED

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